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No. 87-6405

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILLIP D. TOMPKINS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The Texas Court Of Criminal Appeals

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the Texas Court of Criminal Appeals misinterpreted this Court's decision in *Beck* v. *Alabama*, 447 U.S. 625 (1980), in holding that requested instructions on lesser included offenses were not required in this capital case.

2. Whether the Texas Court of Criminal Appeals applied erroneous standards under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), in holding that the prosecution had satisfactorily explained its use of peremptory challenges to exclude all blacks from the jury.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	1
A. Course Of Prior Proceedings	1
B. Material Facts	2
C. Refusal Of The Trial Court To Instruct The Jury On Lesser Included Offenses	4
D. The Use Of Peremptory Challenges To Exclude Black Venirepersons	6
SUMMARY OF ARGUMENT	9
ARGUMENT	
I. THE DECISION BELOW VIOLATED THIS COURT'S HOLDING IN *BECK* V. *ALABAMA*	14
II. THE COURT OF APPEALS MISAPPLIED THIS COURT'S DECISION IN *BATSON* V. *KENTUCKY*	23
A. *Batson* Requires That Prosecutors Explain The Basis For Exercising Peremptory Challenges Once The Defendant Establishes A *Prima Facie* Case Of Racial Exclusion	24
B. The Court of Appeals Misapplied *Batson*	28
1. The Texas court misappled *Batson* in approving the peremptory challenge of Leroy Green	29
a. *Batson* requires that the prosecutor's explanation be relevant as well as facially neutral	32
b. Failure to apply *Batson* cannot be excused on grounds of witness credibility	35
2. The court of appeals misapplied *Batson* in approving the challenge of Isabella Thomas	38

TABLE OF CONTENTS—Continued

	Page
a. The justification relied upon by the court of appeals was not offered by the prosecutor	39
b. The court of appeals erred in refusing to consider evidence of disparate treatment	41
3. The court of appeals erred in approving the challenge of Frank Samuel	44
C. The Texas Court Of Appeals Failed To Apply The Proper Standard Of Appellate Review	46
CONCLUSION	50
APPENDIX	1a

TABLE OF AUTHORITIES

CASES: Page(s)

Akins v. *Texas*, 325 U.S. 398 (1945) 25
Alexander v. *Louisiana*, 405 U.S. 625 (1972) 27
Anderson v. *Bessemer City*, 470 U.S. 564 (1985) 40, 47
Arnold v. *North Carolina*, 376 U.S. 773 (1964) 25
Batson v. *Kentucky*, 476 U.S. 79 (1986) ..... *passim*
Beck v. *Alabama*, 447 U.S. 625 (1980) ..... *passim*
Branch v. *State*, No. 6 Div. 93, slip op. (Ala. May 13, 1988) 37
Brooks v. *Tennessee*, 406 U.S. 605 (1972) 16
Brown v. *North Carolina*, *cert. denied*, 107 S. Ct. 423 (1986) 25
Carter v. *Texas*, 177 U.S. 442 (1900) 24
Casteneda v. *Partida*, 430 U.S. 482 (1977) 42
Cassell v. *Texas*, 339 U.S. 282 (1950) 25, 26
Chambers v. *State*, 724 S.W.2d 440 (Tx. Ct. App. 1987) 32, 33
Commonwealth v. *DiMatteo*, 427 N.E.2d 754 (Mass. App. 1981) 34
Commonwealth v. *Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979) 34, 49
Cordova v. *Lynaugh*, 838 F.2d 764 (5th Cir.), *cert. denied*, 56 U.S.L.W 3849 (U.S. June 14, 1988) 16, 21, 22
Duncan v. *Louisiana*, 391 U.S. 145 (1968) 25
Eubanks v. *Louisiana*, 356 U.S. 584 (1958) 25
Ex parte Virginia, 100 U.S. 339 (1880) 24
Gamble v. *State*, 257 Ga. 325, 357 S.E.2d 792 (1987) ... 34-35
Gibson v. *Mississippi*, 162 U.S. 565 (1896) 24
Griffith v. *Kentucky*, 479 U.S. 314 (1987) 7
Hale v. *Kentucky*, 303 U.S. 613 (1938) 24
Hernandez v. *Texas*, 347 U.S. 475 (1954) 25
Hill v. *Texas*, 316 U.S. 400 (1942) 25
Hillman v. *State*, 362 S.E.2d 417 (Ga. App. 1987) 33
Hopper v. *Evans*, 456 U.S. 605 (1982) 10, 11, 16, 22
Inwood Laboratories, Inc. v. *Ives Laboratories, Inc.*, 456 U.S. 844 (1982) 47
Johnson v. *State*, 740 S.W.2d 868 (Tx. Ct. App. 1987) ... 33
Lefkowitz v. *Cunningham*, 431 U.S. 801 (1977) 16
Martin v. *Texas*, 200 U.S. 316 (1906) 24, 25
Neal v. *Delaware*, 103 U.S. 370 (1881) 24

TABLE OF AUTHORITIES—Continued

Page(s)

Norris v. *Alabama*, 294 U.S. 587 (1935) 24, 27, 47
Patton v. *Mississippi*, 332 U.S. 463 (1947) 25
People v. *Hall*, 672 P.2d 854, 35 Cal. 3d 161, 197 Cal. Rptr. 71 (1983) ..... *passim*
People v. *Moss*, 188 Cal. App. 3d 268, 233 Cal. Rptr. 153 (1986) 40, 49
People v. *Trevino*, 704 P.2d 719 (Cal. 1985) 43
People v. *Wheeler*, 583 P.2d 748 (Cal. 1978) 33, 34, 49
Pierre v. *Louisiana*, 306 U.S. 354 (1939) 25
Reece v. *Georgia*, 350 U.S. 85 (1955) 25
Rogers v. *Alabama*, 192 U.S. 226 (1904) 24
Roman v. *Abrams*, 608 F. Supp. 629 (S.D.N.Y. 1985), *aff'd in part, rev'd in part on other grounds*, 822 F.2d 214 (2d Cir. 1987) 40, 41, 43, 49
Rose v. *Mitchell*, 443 U.S. 545 (1979) 26
Santana v. *State*, 714 S.W.2d 1 (Tex. Crim. App. 1986) . 15
Simmons v. *United States* 390 U.S. 377 (1968) 16
Slappy v. *Florida*, 503 So. 2d 350 (Fla. App. 1987), *aff'd* 522 So. 2d 18 (Fla. 1988), *cert. denied*, 56 U.S.L.W. 3880 (U.S. June 28, 1988) 34, 36-37, 49
Smith v. *State*, 734 S.W.2d 694 (Tx. Ct. App. 1987) 32
Smith v. *Texas*, 311 U.S. 128 (1940) 25
State v. *Gilmore*, 511 A.2d 1150, 103 N.J. 508 (1986) 33, 34, 43
Stevenson v. *United States*, 162 U.S. 313 (1896) 11, 21
Strauder v. *West Virginia*, 100 U.S. 303 (1880) 24, 25
Swain v. *Alabama*, 380 U.S. 202 (1965) 7, 26-27
Texas Department of Community Affairs v. *Burdine*, 450 U.S. 248 (1981) 27-28
Thiel v. *Southern Pacific Co.*, 328 U.S. 217 (1946) 26
United States v. *Biaggi*, 673 F. Supp. 96 (E.D.N.Y 1987) 31, 33
United States v. *Lincoln*, 630 F.2d 1313 (8th Cir. 1980) . 16
United States v. *Salvucci*, 448 U.S. 83 (1980) 16
United States v. *U.S. Gypsum Co.*, 333 U.S. 364 (1948) 47
Vasquez v. *Hillery*, 474 U.S. 254 (1986) 26, 42

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals (J.A. 56) and its order denying rehearing (J.A. 110) are not yet reported. The findings of the 230th Judicial District Court of Harris County, Texas (the "trial court") following the *Batson* hearing, (J.A. 47) are also unreported.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals, affirming petitioner's conviction of capital murder and his sentence of death, was entered on October 21, 1987. A timely motion for rehearing was denied on November 12, 1987. On January 5, 1988, Justice White extended the time to file a petition for certiorari to and including February 10, 1988. The petition was filed on February 10, 1988, and was granted, without limitation, on May 16, 1988. On June 13, 1988, this Court amended the grant of certiorari and limited the grant to consideration of "Questions 1 and 2 presented by the petition." The jurisdiction of the Court rests on 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. The case also involves sections 6.03, 19.02, 19.03, 19.05, 19.07 of the Texas Penal Code and 37.071 of the Texas Code of Criminal Procedure. The text of these provisions is set forth in the Appendix to this brief.

STATEMENT

A. Course Of Prior Proceedings

Petitioner was indicted for the offense of capital murder on February 12, 1981. The bill of indictment alleged that

petitioner intentionally caused the death of Mary D. Berry while committing or attempting to commit robbery and/or kidnapping, in violation of § 19.03(a)(2) of the Texas Penal Code. J.A. 56. Petitioner was tried by a jury and convicted of capital murder on June 11, 1981. The jury returned affirmative answers to the two special sentencing issues which were submitted to it, and the trial judge assessed petitioner's punishment at death. J.A. 57.

Petitioner filed a timely appeal to the Texas Court of Criminal Appeals. While the appeal was pending this Court decided *Batson* v. *Kentucky*, 476 U.S. 79 (1986). The court of appeals consequently abated the appeal and remanded it to the trial court with instructions to conduct a *Batson* hearing. Following the hearing, the trial court entered findings of fact and conclusions of law on the *Batson* issues (J.A. 44-49), and forwarded those findings to the court of appeals.

The court of appeals thereafter affirmed petitioner's conviction of capital murder and sentence of death and denied a timely motion for rehearing.

B. Material Facts

Mary D. Berry, a 24 year-old pharmacist at the Herman Hospital in Houston, Texas (R. Vol. XVIII at 28)[1] left work at approximately 11:00 p.m. on January 25, 1981. R. Vol. XVIII at 29-30. At 12:30 a.m. a policeman found Ms. Berry's car abandoned at a Houston intersection with its lights on and its engine running. R. Vol. XVIII at 59. The rear bumper of the car had been damaged. R. Vol. XVIII at 73-74.

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[1] Citations to the trial court and Texas Court of Criminal Appeals records are hereinafter cited as "R. Vol. ____ at ____."

At 1:30 a.m. on January 26, 1981, a night clean-up man at the Fondren Southwest Bank in Houston, Texas saw petitioner drive up to the bank in a maroon Chevrolet Monte Carlo automobile, operate the automatic teller machine, and place money from the machine in his pockets. R. Vol. XVIII at 93-99. After petitioner left the bank, the clean-up man retrieved a receipt for $1,000 from the top of the automatic teller machine. R. Vol. XVIII at 100.

The audit tape in the teller machine indicated that Ms. Berry's "Quicksilver" bankcard was used to withdraw $1,000 at 1:30 a.m. on January 26, 1981. R. Vol. XIX at 69-75. A camera attached to the automatic teller machine photographed petitioner using the machine at 1:30 a.m. on January 26. R. Vol. XIX at 65-66. The times of the photographs matched the times on the audit tape when Ms. Berry's card was used to withdraw $1,000 from the machine. R. Vol. XVIII at 129-31, R. Vol. XIX at 64-65.

Ms. Berry's body was discovered on the morning of January 27, 1981. R. Vol. XX at 77, 110-15. Ms. Berry had been bound, gagged and tied to a tree. *Id.* Her ankles had been tied together (R. Vol. XX at 124) with a blue fitted bedsheet and a severed portion of a two-strand electrical cord. R. Vol. XX at 112-13, R. Vol. XXII at 6. Her hands had been tied behind her back and a piece of shirt tied around her neck and connected to her hands. R. Vol. XX at 127. A gag of the same bedsheet material used to tie her ankles had been placed in her mouth and a checkered shirt wrapped over her mouth. R. Vol. XXII at 6-7. The gag did not cover her nose. R. Vol. XXIV at 7, R. Vol. XXII at 30-32.

Other than having been bound and gagged, Ms. Berry had not been physically or sexually abused. R. Vol. XXII

at 9-10, 24. The cause of death was found to be suffocation due to gagging on the cloth gag that had been placed in her mouth. R. Vol. XXII at 26.

Petitioner was arrested on a Virginia warrant in Austin, Texas, on January 28 as he and his girlfriend were walking towards their car (R. Vol. XX at 145-55), a maroon Monte Carlo. R. Vol. XX at 183.

A search of the car produced a brown wallet containing two drivers' licenses, one belonging to the petitioner and one to Ms. Berry. R. Vol. XXII at 72. In the wallet was Ms. Berry's "Quicksilver" bankcard and several credit cards belonging to Ms. Berry. R. Vol. XXII at 73. The search of the automobile also produced a watch and chain identified as Ms. Berry's (R. Vol. XXII at 71) and a purse and calculator, later identified as belonging to Ms. Berry. R. Vol. XXIII at 20-21.

The police also found a tape recorder in the trunk with a power cord that had been severed. R. Vol. XXII at 77. A laboratory analysis matched the severed cord of the tape recorder with the electrical cord that had been used to bind Ms. Berry's ankles. R. Vol. XXII at 136. Petitioner's fingerprints were found on Ms. Berry's "Quicksilver" card. R. Vol. XXII at 159-60.

C. Refusal Of The Trial Court To Instruct The Jury On Lesser Included Offenses

Capital murder requires a finding of intentional killing. A principal thrust of petitioner's defense was that he did not intend to kill Ms. Berry when he left her bound, gagged and tied to a tree.[2] Petitioner did not testify on his

[2] Petitioner's counsel argued that, in order to convict the accused of capital murder, the jury must find "a specific intent to kill." R. Vol. XXIV at 6.

own behalf and presented no evidence in his defense, but his lawyer argued to the jury that it could reasonably infer from the evidence that the petitioner did not intend to kill Ms. Berry when he left her bound and gagged. R. Vol. XXIV at 9-10. Counsel argued that the acts of binding and gagging someone are not consistent with an intent to kill. *Id.*

Consistent with the theory of this defense, petitioner requested that the jury be instructed on the lesser included offenses of involuntary manslaughter and criminally negligent homicide. These noncapital offenses differ from capital murder in that they involve negligent or reckless killing but do not require a finding of intentional killing. The trial court refused to instruct the jury on these lesser included offenses, although it did instruct the jury on the lesser included offense of intentional murder. J.A. 33-40.

On appeal, petitioner argued that the trial court's failure to instruct on lesser included offenses involving unintentional killing violated his due process rights as explained by this Court in *Beck* v. *Alabama*, 477 U.S. 625, 637 (1980). J.A. 87-88. The court of appeals rejected this contention holding that there was no evidence that would support an instruction on the lesser included offenses of involuntary manslaughter and criminally negligent homicide. J.A. 81-83.

The court reasoned that, in order to convict petitioner of criminally negligent homicide, the jury would have been required to find that petitioner failed to perceive the risk of death created by his conduct. The court took the view, however, that petitioner's conduct did not show that he was unaware of the risk of causing death, a risk which it found glaringly obvious. J.A. 86-87. On the other hand,

the court of appeals noted that, in order to convict of involuntary manslaughter, the jury would have been required to find that petitioner was aware of the risk and acted in reckless disregard of it. But, the court said petitioner's conduct did not show that he was reckless because he left enough slack in the deceased's bindings to permit some movement of her shoulders and knees. J.A. 87.

The court of appeals also distinguished *Beck* on the ground that the defendant in that case testified and produced evidence that would have justified a conviction of the lesser offenses, whereas here petitioner did not testify or present any such evidence. J.A. 88.[3]

D. The Use Of Peremptory Challenges To Exclude Black Venirepersons

Petitioner is black. During the voir dire of the jury, the prosecution used its challenges and its peremptory challenges to exclude all thirteen prospective black jurors in the venire. Eight of the black jurors were challenged for cause; five were peremptorily challenged.

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[3] After the jury returned a verdict of guilty, it heard evidence on sentencing. At the sentencing stage of trial, petitioner presented evidence that he came from a broken home, that his mother was not supportive, that he had raised his eight brothers and sisters without a father in his house, and that he helped support and protect his family at a young age. R. Vol. XXV at 95-103. There was also evidence that petitioner was of low intelligence (I.Q. of 80) and has emotional problems stemming from his mother's lack of support. R. Vol. XXVI at 31-36. In his petition for certiorari, petitioner argued that the Texas sentencing procedure did not provide a vehicle for the jury to consider this type of mitigating evidence. This issue was withdrawn from consideration by the Court's order of June 13, 1988, and is no longer within the scope of the grant of certiorari.

At the time of petitioner's trial in 1981, this Court had not decided *Batson*. Nonetheless, relying on the Court's opinion in *Swain* v. *Alabama*, 380 U.S. 202 (1965), petitioner moved to quash the jury, on the ground that the prosecution had systematically used its peremptory challenges to purposefully exclude members of petitioner's race from the jury. R. Vol. I at 124-25. The trial court denied the motion. R. Vol. I at 128.

This Court decided *Batson* while petitioner's case was pending on appeal, and in April 1987 held that *Batson* applied to cases pending on direct review or not yet final when *Batson* was decided. *Griffith* v. *Kentucky*, 479 U.S. 314 (1987). As a consequence, the court of appeals abated petitioner's case to the trial court with instructions to conduct a *Batson* hearing. J.A. 47.

At the *Batson* hearing, the prosecutors testified as to their reasons for exercising the peremptory challenges. At the conclusion of the hearing, the trial court issued findings of fact and conclusions of law with respect to each of the five prospective black jurors who were peremptorily challenged. As to each, the trial court found that "the State's excusal [of the juror] was neutral, relative, clear and legitimate as required by *Batson* and was not racially motivated." J.A. 48-49.

On appeal, petitioner conceded that the State had adequately explained its reasons for challenging two of the five prospective jurors, but he argued that the explanations articulated by the prosecutors for excusing the other three prospective jurors—Leroy Green, Isabella Thomas and Frank Samuel—were insufficient under the standards announced by this Court in *Batson*. The court of appeals rejected petitioner's arguments and upheld the challenges of each of the prospective jurors.

With respect to Mr. Green the court of appeals found "that sole reason given why the venireperson was struck was that he was an employee of the United States Postal Service." J.A. 71. The court noted that it had "difficulty understanding the relevancy of a venireperson's employment as a postman . . . as far as his qualifications for jury service" and that no explanation of the relevance of this fact had been offered by the prosecution. J.A. 71. Nonetheless, the court of appeals accepted the prosecutor's explanation for the challenge as adequate under *Batson*, observing that "[the prosecutor] gave . . . a racially neutral explanation"; that "it is not the office of this Court to judge her credibility," and that "[t]he challenge, after all, is still a peremptory one." J.A. 72.

In the case of prospective juror Thomas, the court of appeals found that the explanation provided by the prosecutor and accepted by the trial court was not supported by the evidence. The prosecutor had explained that he struck Ms. Thomas because he was skeptical about her ability to follow the law on circumstantial evidence which he considered disqualifying since "[circumstantial evidence] was my whole case. We had no direct evidence. . . ." J.A. 68. The court of appeals found this explanation "a little shocking and totally not understandable," and inadequate under *Batson*, because, at the time of the voir dire, the prosecutor's case was not based solely on circumstantial evidence: The prosecutor had a confession from petitioner which was not suppressed until later. J.A. 68-69. Nonetheless, the court of appeals approved the challenge of Ms. Thomas on the ground that that the prosecutor may have struck her because of concern that the petitioner's confession would not completely rule out the relevance of circumstantial evidence or that such evidence might ultimately become relevant. J.A. 69-70.

Finally, the court of appeals approved the challenge of Mr. Samuel on the basis of the prosecutor's explanation that he found that Mr. Samuel's "reading and writing skills were poor" and, "[s]ince the case was complex and was expected to include detailed written jury instructions, the State evidently preferred to avoid literacy problems on the jury." J.A. 70.

SUMMARY OF ARGUMENT

I.

In *Beck* v. *Alabama*, 447 U.S. 625 (1980), this Court held that due process requires that the jury be instructed regarding a lesser included offense in a capital case where there is evidence that would permit a rational juror to convict the defendant of the lesser offense.

In this case, petitioner was charged with capital murder, which required a finding that he killed the deceased "intentionally." The evidence, however, left considerable doubt as to whether petitioner had intended to kill the deceased. As a consequence, petitioner requested that the jury be charged on the lesser included offenses of involuntary manslaughter and criminally negligent homicide, neither of which require a finding of intentional killing. The trial court denied petitioner's request and the court of appeals affirmed.

The court of appeals concluded that *Beck* did not apply for two reasons: First, it found *Beck* to be "factually distinguishable" because "[i]n *Beck* . . . the defendant testified at trial and denied that he killed his victim or intended his victim's death, whereas here [petitioner] did not testify or present any evidence from any source that he possessed only the intent to either rob or kidnap [the deceased]." J.A. 88. But, *Beck* does not require a defend-

ant in a capital case to testify or present evidence in order to obtain instructions regarding lesser included capital offenses; it requires such instructions in every case in which the evidence would support a verdict of guilty of the lesser offense. *See Hopper* v. *Evans*, 456 U.S. 605, 610 (1982). Moreover, to require petitioner to testify in order to be entitled to have the jury charged regarding a lesser included offense would create the impermissible situation of requiring that one constitutional right be surrendered in order to obtain another.

Second, the court of appeals concluded that there was no evidence from which a rational juror could have found the petitioner guilty of either involuntary manslaughter or criminally negligent homicide. The court of appeals concluded that, given the manner in which the deceased was bound and gagged, a jury could not have inferred that petitioner was unaware of the risk created by his conduct, and therefore could not have found petitioner to have been negligent. The court also found that the jury could not have inferred that the defendant acted recklessly, the requisite state of mind for involuntary manslaughter, because the court inferred that petitioner had left some slack in the deceased's bindings.

However, these were not the only inferences that could be drawn from the evidence. The jury could have inferred from all the evidence, including the substantial amount of bedsheet used to gag the deceased and the elaborate and restrictive manner in which she was bound, that petitioner acted in "conscious disregard" of the risk, in which case the jury could have convicted the petitioner of involuntary manslaughter. Alternatively, the jury could have inferred that the petitioner should have been, but was not, aware of the risk that his conduct created and convicted him of criminally negligent homicide.

Where more than one inference can be drawn from the evidence, it is for the jury, and not the court, to determine which inference should be drawn. *Stevenson* v. *United States*, 162 U.S. 313 (1896). *Beck* did not alter this fundamental principle. It requires the jury to be permitted "to consider a verdict of guilt of a noncapital offense *'in every case'* in which 'the evidence would have supported such a verdict.'" *Hopper* v. *Evans*, 456 U.S. at 610. (emphasis added). Because there was evidence in this case from which a rational juror could have convicted the petitioner of either involuntary manslaughter or criminally negligent homicide, *Beck* required the jury to be charged regarding these lesser included offenses.

II.

A.

This Court has long held that discrimination on the basis of race in the selection of jurors is a violation of the Equal Protection Clause. In *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the Court applied this principle to the use of peremptory challenges and held that, once a defendant establishes a *prima facie* case of racial exclusion through the prosecutor's use of peremptories, the prosecutor must provide a "neutral explanation related to the case to be tried" for each of the contested challenges. *Id.* at 98. In the absence of such an explanation, "[this Court's] precedents require that petitioner's conviction be reversed." *Id.* at 100.

B.

The Texas court of appeals misapplied *Batson* in approving the three contested challenges in this case.

1. In approving the challenge of prospective juror Green, the court of appeals first rejected all of the reasons

that the trial court found were the basis of the prosecutor's challenge and concluded that the "sole reason" Mr. Green was challenged was the fact that he was an employee of the United States Postal Service. This reason was neither supported by the trial court's findings nor consistent with the testimony of the prosecutor and was so dubious that even the court of appeals conceded that it could see no relevance to the supposed explanation. In holding such an explanation adequate under *Batson*, the court of appeals failed to apply the proper legal standard. It thought that Mr. Green's employment as a postal service employee satisfied *Batson* because it was a "racially neutral explanation." However, *Batson* requires that the prosecutor's explanation not only be neutral, but "relate to the case to be tried." In accepting an explanation for the Green challenge that it acknowledged bore no comprehensible relation to the case, the court of appeals eviscerated *Batson* and committed reversible error.

2. The court of appeals justified the challenge of prospective juror Thomas on grounds that were again inconsistent with the trial court's findings and the prosecutor's own testimony. The prosecutor testified that he challenged Ms. Thomas because his case depended *entirely* on circumstantial evidence and he was skeptical of Ms. Thomas' ability to apply the law of circumstantial evidence. The court of appeals found that, contrary to the prosecutor's testimony, his case was not dependent "entirely, if at all," on circumstantial evidence, because at the time of the challenge he had petitioner's confession which had not then been suppressed. Thus, the court of appeals found the prosecutor's explanation "a little shocking" and "totally not understandable" and concluded that no rational fact-finder could have accepted the explanation as plausible. The court of appeals nonetheless

approved the challenge, speculating that, although he had the confession, the confession did not totally rule out the law of circumstantial evidence, hence the prosecutor *may* have been concerned that circumstantial evidence *might* become relevant and struck Ms. Thomas "rather than risk a hung jury." This supposed motivation was neither advanced by the prosecutor nor found by the trial court.

In approving the Thomas challenge, the court of appeals completely ignored the purpose of the *Batson* inquiry. That inquiry is to examine the explanation provided by the prosecutor to determine if it is legitimate or pretextual. If the explanation proffered by the prosecutor is not found plausible, it must be rejected. That justifications other than the prosecutor's would have been supportable if they had been the reason for the challenge is irrelevant.

3. The court of appeals concluded that prospective juror Samuel was struck because his "reading and writing skills were poor" and "the State evidently preferred to avoid literacy problems on the jury." Although the State came closer to satisfying *Batson* in explaining this challenge, its explanation is not supported by the record. During the voir dire the prosecutor sought to confirm his suspicion that Mr. Samuel was illiterate by asking him to read the first two statutory sentencing questions. Samuel read these questions without difficulty, demonstrating an ability to read at an advanced level.

C.

If *Batson* is to have meaning, appellate courts must conduct a careful and sensitive review of *Batson* findings made by the trial court, and must reject those findings where they do not satisfy *Batson's* standards or are flatly contradicted by objective facts in the record. The inquiry

that *Batson* requires was intended to ensure that defendants' constitutional rights would be protected against subversion by the discriminatory use of peremptory challenges. It was meant to end the immunity of peremptory challenges from constitutional scrutiny.

In this case, the court of appeals failed to conduct the appropriate scrutiny. It rejected virtually all of the findings of the trial court as implausible, yet approved the contested challenges on grounds not advanced by the prosecutor and, in one instance, having no relevance whatsoever to this case. If appellate courts are permitted to ignore *Batson's* requirements in this manner, the promise of *Batson* will be illusory and prosecutors will have a license to violate the Constitution by inventing pretexts that lack even logical plausibility.

ARGUMENT

I. THE DECISION BELOW VIOLATED THIS COURT'S HOLDING IN *BECK* V. *ALABAMA*

This Court held in *Beck* v. *Alabama* that due process requires the jury to be instructed regarding a lesser included offense in a capital case where the evidence would permit the jury rationally to convict the defendant of the lesser offense. 447 U.S. 625, 645 (1980). The Court grounded its holding on the need for reliability in the fact finding process, noting that "when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." *Id.* at 637.

The evidence in the instant case strongly suggested that petitioner had killed the deceased but left considerable doubt regarding whether he intended to kill her. Petitioner requested that the jury be charged regarding the lesser included offenses of involuntary manslaughter and criminally negligent homicide, neither of which require a finding of intent to kill. The trial court denied petitioner's request and charged the jury only as to capital murder and intentional murder. By so doing, the court denied the jury the option of convicting petitioner of unintentional homicide, even if the jury concluded factually that that was the actual nature of his crime.

Petitioner argued on appeal that *Beck* required the jury to be charged regarding the lesser included offenses of involuntary manslaughter and criminally negligent homicide because the jury could have rationally acquitted him of capital murder and convicted him of one of those offenses. The court of appeals found *Beck* to be "factually distinguishable" because "[i]n Beck . . . the defendant testified at trial and denied that he killed his victim or intended his victim's death, whereas here appellant did not testify or present any evidence from any source that he possessed only the intent to either rob or kidnap [the deceased]." J.A. 88.[4] The court also parsed the record and found in effect that the petitioner's conduct was either too reckless to be negligent or too negligent to be reckless.

The ground of decision based upon the petitioner's failure to testify or present evidence demands little dis-

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[4] The court of appeals cited *Santana* v. *State*, 714 S.W.2d 1 (Tex. Crim. App. 1986), in which it also found *Beck* to be distinguishable because, unlike the appellant in *Santana*, "Beck testified at trial and denied that he killed the victim or intended the victim's death." *Id.* at 9.

cussion. The court of appeals plainly erred in holding that *Beck* did not compel the requested lesser included offense instructions because petitioner had not testified or presented evidence. *Beck* does not require a defendant in a capital case to testify or to present evidence in order to obtain instructions to the jury regarding a lesser included noncapital offense, it requires such instructions "*in every case* in which the evidence would have supported" a verdict of guilty of the lesser offense. *Hopper* v. *Evans*, 456 U.S. 605, 610 (1982) (emphasis added).[5] To say that an accused must testify or must present evidence regarding his intent, in order to receive a jury charge necessary for the fair and reliable determination whether he is guilty of a capital offense or only of a lesser crime supported by the prosecution's case-in chief, would create the "intolerable" result that "one constitutional right . . . be surrendered in order to assert another." *Simmons* v. *United States*, 390 U.S. 377, 394 (1968). *Accord United States* v. *Salvucci*, 448 U.S. 83, 89-90 (1980); *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806-07 (1977); *Brooks* v. *Tennessee*, 406 U.S. 605, 612-13 (1972). Consequently, petitioner was entitled to instructions on the lesser included offenses of involuntary manslaughter and criminally negligent homicide if the evidence from any source would have supported a verdict of guilty of those offenses.

The evidence here established that a strip of bedsheet was stuffed deep into the deceased's mouth and that another strip of bedsheet was tied around her mouth. The deceased's hands were tied behind her back and connected

[5] The federal courts of appeal have applied *Beck* notwithstanding the lack of any testimony or evidence presented by the defendant. *See, e.g., Cordova* v. *Lynaugh*, 838 F.2d 764 (5th Cir.), *cert. denied*, 56 U.S.L.W. 3849 (U.S. June 14, 1988); *United States* v. *Lincoln*, 630 F.2d 1313, 1318 n.1, 1320-21 (8th Cir. 1980).

to a piece of shirt tied around her neck. The deceased's feet were tied together with a bedsheet and electrical cord, and the deceased was also tied to a tree. The evidence suggested that the deceased was tightly bound and gagged but that sufficient slack existed "to allow[] some movement of [her] knees and shoulders." J.A. 83.

This evidence would support a verdict of guilty of involuntary manslaughter. Texas defines involuntary manslaughter as "recklessly caus[ing] the death of an individual." Tex. Penal Code Ann. § 19.05(a)(1). "A person acts recklessly . . . with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." *Id.*, § 6.03(c). The jury could reasonably have inferred from the evidence regarding the way in which the deceased was gagged and bound that petitioner had created a substantial and unjustifiable risk that she would die and that petitioner was aware of but consciously disregarded that risk.

The evidence before the jury would also have supported a verdict of guilty of criminally negligent homicide. Texas law defines criminally negligent homicide as "caus[ing] the death of an individual by criminal negligence." Tex. Penal Code Ann. § 19.07. "A person acts with criminal negligence . . . with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur." *Id.*, § 6.03(d). The risk must be of such a nature and degree that "the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." *Id.*, § 6.03(d). The jury could

reasonably have inferred from the evidence regarding the manner in which the deceased was gagged and bound that petitioner had created a substantial and unjustifiable risk of her death, that petitioner ought to have been but was not aware of that risk, and that petitioner's failure to perceive that risk grossly deviated from the standard of care that an ordinary person would have exercised under the circumstances.

The court of appeals thought that the manner in which petitioner had gagged and bound the deceased precluded the jury from inferring that he had been unaware of the risk his conduct created. "We cannot conclude from the evidence that was presented that one might infer therefrom that when appellant gagged, tied his victim's hands tightly behind her back, tied a piece of shirt around her neck which was connected to her hands, tied her feet together with a bed sheet and an electrical cord, with the entire system of knots and materials tied very tight, that he was then unaware of the risk his conduct created." J.A. 85-86. Consequently, the court of appeals concluded that the jury could not have inferred that petitioner was unaware of the risk he had created and could not have convicted him of criminally negligent homicide. J.A. 86.

But the court of appeals then reversed its field in order to find that the jury also could not have inferred that petitioner was reckless. Any inference of recklessness was said to be negated by evidence that petitioner "left enough slack" in the deceased's bindings to permit some movement of her shoulders and knees. J.A. 87. That evidence, the court concluded, "reflects that [petitioner] was not 'reckless' as the term is defined," and therefore precluded a conviction of involuntary manslaughter. J.A. 87.

There are several flaws in this reasoning. To begin with, the evidence established only that there was slack in the

deceased's bindings, not that petitioner left the slack. The inference that he did so, while reasonable, is not the only reasonable inference that could be drawn from the evidence. For example, the jury could have inferred that the slack had been created by the deceased's movements rather than by petitioner. Had the jury so inferred, it might not have concluded, as did the court of appeals, that petitioner "was not 'reckless' as the term is defined." J.A. 87. Furthermore, even if the jury had inferred that petitioner left the slack, it could still have concluded that he acted recklessly by stuffing large amounts of bedsheet deep into the deceased's mouth, gagging her, and tightly fastening her hands and feet so that she was unable to loosen the gag.

In any event, the court of appeals did not explain why the jury would have been precluded from finding petitioner to have acted recklessly if it inferred that he left some slack in the deceased's bindings. However, its logic seems to be that an inference that petitioner left some slack in the bindings would preclude the jury from concluding that petitioner was aware of the risk he had created. But that logic directly contradicts the court's earlier conclusion that the jury could not have found petitioner guilty of criminal negligence because it was required to infer that petitioner was aware of the risk he had created. J.A. 87-88.[6] Only one of these conclusions can stand.

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[6] This contradiction was noted by the dissent:

> First the majority says appellant's conduct precludes an inference "that he was then unaware of the risk his conduct created," and speculation that he did not intend the result "does not change his *awareness or perception* of the risk his conduct created." Slip opinion at 23. So much for criminally negligent homicide. Next it says, "[w]ithout evidence that appellant acted recklessly in causing the death of ~~his victim~~ [involuntary manslaughter was not raised]." *Id.*, at 24. But the majority had just found [petitioner] *was* aware of the risk.

J.A. 103 n.1 (emphasis in original).

Either the jury was required to infer that petitioner was aware of the risk that his conduct created, as the court found in discussing criminal negligence, or it was required to infer that he was unaware of that risk, as the court appears to have assumed in discussing recklessness. If the jury was required to infer that petitioner was aware of the risk that his conduct created, then the jury could reasonably have concluded that he recklessly killed the deceased, and convicted him of involuntary manslaughter. If, on the other hand, the jury was required to infer that petitioner was unaware of the risk that his conduct created, then the jury could reasonably have inferred that he negligently killed the deceased, and convicted him of criminally negligent homicide. In either case, the evidence would support a verdict of guilty of a lesser included noncaptial offense, and *Beck* required that the jury be instructed regarding that offense.

It is also possible that the court of appeals viewed the evidence that petitioner left slack as establishing that petitioner did not "conscious[ly] disregard" the risk his conduct created. While the jury could have inferred that petitioner had not "conscious[ly] disregard[ed]" the risk because he left slack in the deceased's bindings, that inference was not compelled.[7] The jury could instead have inferred that petitioner *inadvertently* left the slack, and that the slack therefore had no bearing upon whether or not petitioner acted in "conscious disregard" of the risk he created. Alternatively, even if the jury concluded that the slack was intentional, it might nevertheless have inferred from all the evidence, including the substantial amount of bedsheet used to gag the deceased and the elaborate and

[7] A far more likely inference from this evidence was that petitioner did not intend to kill the deceased.

restrictive manner in which she was bound, that petitioner had acted in "conscious disregard" of the risk he had created. In either case, the jury could reasonably have concluded that petitioner had been reckless and convicted him of involuntary manslaughter.

Where more than one inference can be drawn from the evidence, it is for the jury, and not the court, to determine which inference should be drawn. "The evidence as to [the lesser included offense] need not be uncontradicted or in any way conclusive" before the jury should be charged regarding that offense. *Stevenson* v. *United States*, 162 U.S. 313, 315 (1896). "So long as there was some evidence" relevant to the lesser included offense, "the credibility and force of such evidence must be for the jury, and cannot be [a] matter of law for the decision of the court." *Id.* The lesser included offense must be charged "[i]f there were *any* evidence which tended to show such a state of facts as might bring the crime within" that offense, for it "then became a proper question for the jury to say whether the evidence were true." *Id.* (emphasis added).

Beck embodies this fundamental principle. *See, e.g.*, *Cordova* v. *Lynaugh*, 838 F.2d at 769. *Cordova* makes clear that *Beck* required petitioner's jury to be given the opportunity to consider whether he was guilty of the lesser included offenses of involuntary manslaughter or criminally negligent homicide. Like petitioner's case, *Cordova* arose from the refusal of a Texas court to charge the jury regarding lesser included offenses in a capital murder prosecution. The Texas Court of Criminal Appeals affirmed the lower court's refusal to charge the jury regarding murder and aggravated assault on the grounds that "[t]here is no evidence in the record that [Cordova] was guilty of only a lesser included offense."

Cordova v. *State*, 698 S.W.2d 107, 113 (Tex. Crim. App. 1985).

The United States Court of Appeals for the Fifth Circuit disagreed. It found that *Beck* required the lesser included offense of murder to be charged if "a rational jury could have found that Cordova murdered [the deceased] but that it was not in the course of the robbery." *Cordova*, 838 F.2d at 769. The Fifth Circuit agreed with the Texas court of appeals that "the jury could infer that Cordova had a prior agreement to rob the deceased" and could thus have found that he had participated in the robbery as a "party" under Texas law. *Id.* at 796. It noted, however, that the "jury could reject that inference . . . [and] conclude that Cordova did not have a prior agreement to rob [the deceased]." *Id.* In other words, "the evidence would support the jury in finding either that Cordova planned the robbery of [the deceased] or that he did not so plan." *Id.* at 770. Since the "evidence would have supported [a] verdict [of guilty of non-capital murder]," and since the jury was not charged regarding that offense, "Cordova's due process rights were violated." *Id.*, *quoting Hopper* v. *Evans*, 456 U.S. at 610.

Petitioner's due process rights were likewise violated by the trial court's failure to charge the requested lesser included offenses. The jury could have reasonably inferred from the evidence either that petitioner was reckless or that he was not. The jury could also reasonably have inferred from that evidence either that petitioner was criminally negligent or that he was not. Under these circumstances, *Beck* required the jury to be charged regarding the lesser included offenses of involuntary manslaughter and criminally negligent homicide so that it could determine which of those inferences was correct.

The trial court's charge regarding intentional (non-capital) murder did not relieve it of its obligation under *Beck* to charge the jury regarding lesser included offenses that it could have found from the evidence. The evidence would have permitted the jury rationally to have convicted petitioner of those offenses. *Beck* was grounded upon this Court's concern for the "reliability of the guilt determination" in capital cases. *Beck*, 447 U.S. at 638. That concern is not satisfied simply by giving the jury a means to compromise between acquittal and conviction of a capital offense. What is required is that the jury be given an opportunity to reflect in its verdict any findings that it could rationally make from the evidence before it. Here, the only lesser included offense charged—intentional murder—did not give the jury the option of convicting petitioner of an unintentional killing if it found factually, as defense counsel had argued vigorously in closing, that the evidence left substantial doubt regarding petitioner's intent to kill the deceased. Denying this option deprived petitioner of the reliable fact-finding process commanded by *Beck*.

II. THE COURT OF APPEALS MISAPPLIED THIS COURT'S DECISION IN *BATSON* V. *KENTUCKY*

In his concurrence in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), Justice White observed that "much litigation will be required to spell out the contours of the Court's Equal Protection holding today." *Batson*, 476 U.S. at 102. The present case calls upon the court to spell out the basic principle that pretextual explanations by prosecutors and their uncritical acceptance by state courts do not satisfy *Batson*. If the approach to reviewing *Batson* manifested by the court below is accepted as adequate, *Batson* will have no meaning and the Equal Protection scrutiny it promises will be illusory.

After petitioner established a *prima facie* case that his prosecutors had excluded prospective jurors on the basis of race, the prosecutors testified to their reasons for peremptorily challenging five prospective black jurors. The trial court found that the prosecutors' explanations were adequate. The court of appeals agreed, albeit for different reasons than the trial court.

In one instance, the court of appeals accepted as an adequate explanation the fact that the prospective juror was a postal service employee, while conceding that that fact bore no relevance to the juror's fitness to serve, either in general or in particular. In another instance, the court of appeals rejected as implausible the explanation offered by the prosecutor, but approved the challenge on the basis of an alternative explanation conjectured by the court and never advanced by the prosecutor. Further, it approved explanations plainly not supported by the record.

A. *Batson* Requires That Prosecutors Explain The Basis For Exercising Peremptory Challenges Once The Defendant Establishes A *Prima Facie* Case Of Racial Exclusion

For more than a century this Court has recognized that forcing a defendant to go to trial before a jury from which members of his race have been purposefully excluded is a denial of equal protection. *Strauder* v. *West Virginia*, 100 U.S. 303 (1880).

This principle has repeatedly and consistently been applied by this Court. *See Ex parte Virginia*, 100 U.S. 339 (1880); *Neal* v. *Delaware*, 103 U.S. 370 (1881); *Gibson* v. *Mississippi*, 162 U.S. 565 (1896); *Carter* v. *Texas*, 177 U.S. 442 (1900); *Rogers* v. *Alabama*, 192 U.S. 226 (1904); *Martin* v. *Texas*, 200 U.S. 316 (1906); *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Hale* v. *Kentucky*, 303 U.S. 613

(1938); *Pierre* v. *Louisiana*, 306 U.S. 354 (1939); *Smith* v. *Texas*, 311 U.S. 128 (1940); *Hill* v. *Texas*, 316 U.S. 400 (1942); *Akins* v. *Texas*, 325 U.S. 398 (1945); *Patton* v. *Mississippi*, 332 U.S. 463 (1947); *Cassell* v. *Texas*, 339 U.S. 282 (1950); *Hernandez* v. *Texas*, 347 U.S. 475 (1954); *Reece* v. *Georgia*, 350 U.S. 85 (1955); *Eubanks* v. *Louisiana*, 365 U.S. 584 (1958); *Arnold* v. *North Carolina*, 376 U.S. 773 (1964).

The Court's refusal to permit racial discrimination to play any role in the selection of a jury rests on "this Nation's profound commitment to the ideal of racial equality," *Brown* v. *North Carolina*, *cert. denied*, 107 S. Ct. 423, 424 (1986) (J. O'Connor, concurring), and on the defendant's fundamental right to trial by jury. Discrimination in the selection of juries "denies to [a defendant] the protection that a trial by jury is intended to secure." *Batson*, 476 U.S. at 86. "The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal *status* in society as that which he holds." *Strauder*, 100 U.S. at 308 (emphasis in original). "For a jury to perform its intended function as a check on official power, it must be drawn from the community." *Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968). Discriminatory selection procedures would make "juries ready weapons for officials to oppress . . . minorities." *Akins*, 325 U.S. at 408 (J. Murphy, dissenting).

While a defendant has no right to a jury composed in whole or in part of persons of his own race, *Strauder*, 100 U.S. at 305, he does have "the right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria." *Martin* v. *Texas*, 200 U.S. at 320-21. Implicit in this requirement is the principle that

"[j]urymen should be selected as individuals, on the basis of individual qualification, and not as members of a race." *Cassell* v. *Texas*, 339 U.S. 282, 286 (1950). The Court's decisions in this area recognize, therefore, that "[a] person's race simply 'is unrelated to his fitness as a juror.'" *Batson* 476 U.S. at 87, *quoting Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 227 (1946) (J. Frankfurter, dissenting).

In recent years the Court has revisited these premises in the context of the question whether racially discriminatory jury selection can be excused as harmless error. In these cases, the Court has reaffirmed that discrimination on the basis of race in the selection of jurors "strikes at the fundamental values of our judicial system and our society as a whole" and denies the defendant's right to equal protection of the laws. *Rose* v. *Mitchell*, 443 U.S. 545, 556 (1979). The Court has forcefully reiterated that "intentional discrimination in the selection of . . . jurors is a grave constitutional trespass, possible only under color of state authority, and wholly within the power of the State to prevent." *Vasquez* v. *Hillery*, 474 U.S. 254, 262 (1986). It "is not amenable to harmless-error review," because "discrimination in the . . . [selection of the] jury undermines the structural integrity of the criminal tribunal itself." *Id.* at 263-64. "The overriding imperative to eliminate this systematic flaw . . . requires [this Court's] continued adherence to a rule of mandatory reversal." *Id.* at 264.

In *Swain* v. *Alabama*, 380 U.S. 202 (1965), the Court recognized that peremptory challenges could violate these principles, and acknowledged that the systematic prosecutorial use of peremptory challenges to exclude persons from juries because of their race would implicate the Equal Protection Clause. *Id.* at 221-22. The Court

declined, however, to scrutinize the prosecutor's use of peremptory challenges in any particular case. *Id.* at 222.

In *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the Court overruled this latter aspect of *Swain* on finding that, as interpreted, *Swain* had created a "mission impossible" for defendants and had rendered "prosecutors' peremptory challenges . . . largely immune from constitutional scrutiny." *Id.* at 92-93.

Batson announced that once a defendant established a *prima facie* showing of discrimination, the State must explain its bases for peremptorily challenging prospective black jurors. *Id.* Although the Court "emphasize[d] that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause," *id.* at 97, it made clear that the "prosecutor [could not] rebut the defendant's *[prima facie]* case merely by denying that he had a discriminatory motive or [simply by] 'affirm[ing] [his] good faith in making individual selections.'" *Id.* at 98, *quoting Alexander* v. *Louisiana*, 405 U.S. 625, 632 (1972). The Court reasoned that "[i]f these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be a vain and illusory requirement.'" *Batson*, 476 U.S. at 98, *quoting Norris* v. *Alabama*, 294 U.S. at 598.

As a consequence, *Batson* held that in order to rebut a defendant's *prima facie* case, the prosecutor must "articulate a neutral explanation [for the peremptory challenge] *related to the particular case to be tried.*" *Batson*, 476 U.S. at 98 (emphasis added). Such an explanation, the Court held, must be "'clear and reasonably specific' and constitute 'legitimate reasons' for exercising the [prosecutor's] challenges." *Id.* at 98 n.20, *quoting Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 258

(1981).[8] "If the . . . prosecutor does not come forward with a neutral explanation for his action, [the Court's] precedents require that petitioner's conviction be reversed." *Batson*, 476 U.S. at 100.

In this case, the defendant established a *prima facie* case and the prosecutors explained the basis for their challenge of black jurors. The question presented is whether those explanations and the court of appeals' review of them were adequate under *Batson*.

B. The Court of Appeals Misapplied Batson

The trial court found that petitioner had established a *prima facie* case of discrimination under *Batson*. J.A. 62. That finding was not challenged on appeal. J.A. 63. Under *Batson*, once a *prima facie* case of discrimination has been made, the prosecution must provide a sufficient explanation for its peremptory challenges to each black juror.

There were five such challenges here. With respect to two, petitioner conceded that the prosecutor's explanations were adequate, and he did not contest these challenges on appeal.[9] Petitioner's appeal focused on the remaining three black jurors who were peremptorily struck: Leroy Green, Isabella Thomas, and Frank Samuel.

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[8] *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981) is a Title VII case. *Batson* directed courts and litigants to Title VII cases for guidance in pursuing *Batson's* inquiry into discriminatory intent. *See, e.g., Batson*, 476 U.S. at 94, n.18; 96, n.19; and 98, nn.20, 21.

[9] These two jurors "were struck because of their general opposition to the death penalty." J.A. 67.

1. The Texas court misapplied *Batson* in approving the peremptory challenge of Leroy Green[10]

The court of appeals found that "the sole reason . . . [Leroy Green] was struck was that he was an employee of the United States Postal Service." J.A. 71. Although the court expressed "grave concern" about this challenge and conceded that it had "difficulty understanding the relevancy of a venireperson's employment as a postman . . . as far as his qualifications for jury service" (J.A. 71), it nonetheless approved the challenge because: (1) the prosecutor's explanation for the challenge, *i.e.*, Mr. Green's employment as a postal worker, was "a racially neutral explanation"; (2) "it is not the office of this Court to judge [the prosecutor's] credibility"; and (3) "[t]he challenge, after all, is still a peremptory one." J.A. 72.

The court's conclusion cannot be squared with *Batson*.

First, the "racially neutral explanation" on which the court of appeals relied is not supported by any finding of the trial court. To the contrary, while accepting a variety of other explanations for striking Mr. Green[11] (J.A. 72), the trial court did *not* find that Mr. Green's occupation as a postal service employee was the basis for the prosecutor's decision to challenge him. The inference is that the trial court gave little or no weight to her professed concerns

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[10] The voir dire or Mr. Green appears at R. Vol. XVI at 95-127.

[11] The court of appeals concluded that none of the explanations found by the trial court were supported by the record. It rejected them (J.A. 72), concluding that Mr. Green's "answers to questions asked did not indicate an inability on his part, that was any greater or less than the unchallenged venirepersons, to understand the law or to apply it impartially" (J.A. 71), and that Mr. Green "did not indicate a bias or prejudice against any phase of the law pertinent to this case." *Id.*

about Mr. Green's occupation, which were equivocal at best. *See* n.12 *infra*.

Second, the court of appeal's justification for sustaining this challenge is contradicted by the prosecutor's own testimony. The court of appeals found that the "*sole* reason . . . Mr. Green was struck was that he was an employee of the . . . Postal Service," (J.A. 71), but the prosecutor expressly testified to the contrary. She stated that, while a juror's employment by the Postal Service was "kind of an alert to me," Batson Tr. at 209, "[i]t makes a difference *only if there are other factors I am uncomfortable with.*" *Id.* at 216 (emphasis added).[12]

The court of appeals thus had no record support for translating the prosecutor's professed concern about Mr. Green's occupation into an independent and sufficient explanation for the challenge. The prosecutor offered a litany of reasons for challenging Mr. Green, but none were accepted by the court of appeals as at all plausible except her concern about Mr. Green's occupation. If that was indeed the "sole reason" for her challenge, her invention of the others was an exceedingly suspicious circumstance, establishing doubt, rather than confidence, in her purported racial neutrality.

Third, Mr. Green's occupation bore no rational relationship to his fitness to serve as a juror in general or in this case. There is no real or apparent attribute of postal workers as a group that might be relevant to the issues in

[12] *See also* Batson Tr. at 214. (emphasis added).

Q. And . . . you haven't had good luck with postal workers?

A. Sometimes I have, but I am alert if there are other things about the person I am concerned about, that *together with the fact they are postal workers, gives me some cause for concern.*

Mr. Tompkins' prosecution. Nor was there any relationship, apparent or explained, between Mr. Green's occupation and the parties, the witnesses, the victim, or the lawyers. In short, the fact that Mr. Green was a postal worker was wholly irrelevant in measuring his fitness for service as a juror.[13]

Indeed, Mr. Green's employment as a postal worker constituted such a dubious explanation for the challenge that even the court of appeals had to admit that it could not discern any logical relationship between that fact and Mr. Green's fitness to serve as a juror. Nor did the court demand that the reason for the challenge make any sense and noted that "the State [had not] undertaken to enlighten [the court]" (J.A. 72) as to how Mr. Green's employment was relevant in any way to his service as a juror. It simply accepted at face value an explanation that it acknowledged to have no discernable logical basis.

[13] Petitioner does not argue, of course, that a person's occupation may never be a legitimate reason for exercising a peremptory challenge. For example, *United States* v. *Biaggi*, 673 F. Supp. 96 (E.D.N.Y. 1987), also involved a peremptory challenge which was explained on the basis of the juror's employment with the postal service. In *Biaggi*, however, the prospective juror's occupation was relevant in the context of that case. "[H]e [the juror] had been employed in the Post Office, which might have led him to sympathize with Mr. Biaggi, himself a one time postal worker and public advocate of civil servants' causes." *Id.* at 105. (Similarly, the prosecutor explained his challenge of a retired police officer on the grounds that "he had been in the police department about the same time as Mr. Biaggi, and Mr. Biaggi's wide reknown [sic] and extraordinary prestige as a police officer, and his past executive office in the Patrolmen's Benevolent Association, suggested to the prosecution that [the juror] would sympathize with the defendant." *Id.*) In petitioner's prosecution, however, there was no such relationship between Mr. Green's occupation and any aspect of the case.

a. *Batson* requires that the prosecutor's explanation be relevant as well as facially neutral.

In accepting the prosecutor's explanation as adequate under *Batson*, while conceding that Mr. Green's occupation was not relevant to his fitness to serve as a juror, the Texas court failed to apply the proper legal standard. *Batson* expressly requires that the prosecutor's explanation for a peremptory challenge satisfy a two-part test: it must be "neutral" and "related to the particular case to be tried." *Batson*, 476 U.S. at 98. The court of appeals here cited the first part of the test but ignored the second. Mr. Green's occupation as a postal service employee was a "racially neutral" reason that, as the court of appeals itself acknowledged, bore no inherent, explained, or even ostensible relation to the case to be tried. By failing to apply the second part of the *Batson* test, the Texas court committed reversible error.

Both parts of *Batson's* two-part test are essential; if either part is missing, the test becomes meaningless. A facially neutral explanation which is unrelated to the case to be tried, is no explanation at all. Any peremptory challenge can be adequately explained away if an explanation that is racially neutral in the abstract is all that is required. A prosecutor bent on discrimination can justify any challenge simply by picking some non-racial characteristic of the prospective juror and articulating that as the reason for the challenge, without regard to its logic or bearing on the prospective juror's fitness to serve, in general, or in the case at hand.[14]

[14] There is a broad range of facially neutral explanations which, if relevant, could rebut the defendant's *prima facie* case. *See, e.g., Chambers* v. *State*, 724 S.W.2d 440, 442 (Tx. Ct. App. 1987) (juror's age); *Smith* v. *State*, 734 S.W.2d 694, 698 (Tx. Ct. App. 1987) (juror's occupation); *Johnson* v. *State*, 740 S.W.2d 868, 870-71 (Tx. Ct. App. 1987) (juror's marital status); *Chambers*, 724 S.W.2d at 442 (juror's religious persuasion); *United States* v. *Biaggi*, 673 F. Supp. 96, 105 (E.D.N.Y. 1987) (juror's attire); and *Hillman* v. *State*, 362 S.E.2d 417, 418 (Ga. App. 1987) (juror's facial and cranial hair). With no requirement that the neutral reason be relevant to the juror's fitness to serve, in general or in the case at hand, virtually any of these explanations could easily form the basis for a pretextual challenge.

Batson's requirement that the prosecutor's explanation relate to the case to be tried was intended to serve as a safeguard against prosecutors using racially neutral explanations as a pretext for discrimination by ensuring that there be some logic apparent in the reason articulated. After all, as *Batson* noted, peremptory challenges by their nature lend themselves to discriminatory use. *Batson*, 476 U.S. at 94-95. *Batson's* requirement that prosecutors explain the basis for peremptory challenges in those limited instances in which defendants have established a *prima facie* case of discrimination was based on the Court's refusal "to attribute to chance the absence of black citizens on a . . . jury . . . where the selection mechanism is subject to abuse." *Id.* at 95. In such cases, the Court felt compelled to require prosecutors to explain the basis for exercising the peremptory challenge in order to determine whether the use of the challenge has been "legitimate," *id.* at 98, n.20, or a pretext for discrimination.[15]

[15] The California Supreme Court has defined the court's role in this context as "satisfy[ing] itself that the [prosecutor's] explanation is genuine." *People* v. *Hall*, 672 P.2d 854, 858, 197 Cal. Rptr. 71, 35 Cal. 3d 161 (1983) (emphasis in original). *Accord State* v. *Gilmore*, 511 A.2d 1150, 1165 (N.J. 1986) ("The trial court must decide whether these [the prosecutor's explanations] are . . . genuine and reasonable grounds . . . [or] 'sham excuses belatedly contrived . . .'"), *quoting People* v. *Wheeler*, 583 P.2d 748, 765 (Cal. 1978).

For these reasons, state courts that make meaningful *Batson-type* inquiries have recognized the need to find some degree of relevance between a facially neutral reason articulated by the prosecutor and the fitness of the juror to serve. In California, for example, "the prosecutor must satisfy the court that he exercised such peremptories on grounds that were *reasonably relevant* to the particular case on trial or its parties or witnesses—*i.e.*, the reasons for specific bias." *People* v. *Wheeler*, 583 P.2d 748, 765 (Cal. 1978) (emphasis added). In Massachusetts, prosecutors must demonstrate that the "juror's . . . unique relationship to the particular case raises the specter of individual bias. *Commonwealth* v. *Soares*, 387 N.E.2d 499, 514 (Mass.), *cert. denied*, 444 U.S. 881 (1979). Florida recognizes that *Batson* requires that the prosecutor's explanation provide some basis for concluding that there is a relationship between the reason articulated for the challenge and the ability of the juror to serve competently or impartially in the case at hand. *See, e.g., Slappy* v. *Florida*, 503 So. 2d 350, 355 (Fla. App. 1987), *aff'd*, 522 So. 2d 18 (Fla. 1988) (where the court rejected a prosecutor's justification for excluding a schoolteacher based on the prosecutor's belief that the schoolteachers were liberal because the prosecutor did not explain how liberalism could "affect an ability to follow the law in a concealed firearm case"); *see also Commonwealth* v. *DiMatteo*, 427 N.E.2d 754, 757 (Mass. App. 1981) (disapproving of a challenge on the grounds that "widowhood [is] a tenuous indicator of bias in connection with the crime of armed robbery of a gas station"); *State* v. *Gilmore*, 511 A.2d at 1168 (rejecting a challenge based on an asserted lack of high intelligence because there was "no reasonable relevancy between the issues to be resolved by the jury and the high intellectual achievement of jurors"); and *Gamble* v. *State*, 257 Ga. 325, 328, 357 S.E.2d 792, 795-96 (1987) (rejecting the exclusion of a potential juror because he is a Mason, where "it is not clear how Masonic membership is related to this case.").

These courts and this Court in *Batson* have recognized that, in order for the pretextual analysis required by *Batson* to be meaningful, the inquiry cannot stop at facial neutrality. There must be some discernible relationship between the neutral reason articulated and the juror's fitness to serve as a juror, in general, or in the "case to be tried." This relationship can be apparent or it can be explained by the prosecutor. But, it must be present.

The court of appeals could discern no such relationship here and the prosecutor did not provide one. "[S]he did not elaborate upon her evident bias against such employees . . . nor has [she] undertaken to enlighten us . . . on the subject." J.A. 72. In approving the Green challenge, while conceding that there was no relevancy between Mr. Green's occupation and his qualification for jury service, the court of appeals ignored *Batson's* requirement.

b. Failure to apply *Batson* cannot be excused on grounds of witness credibility.

The court of appeals sought to justify its failure to apply the second part of the *Batson* test by asserting that it was bound to accept the prosecutor's neutral explanation as adequate on grounds of witness credibility: "it is not the office of this Court to judge her credibility." J.A. 72. This statement reflects a fundamental misunderstanding of the nature of the inquiry required by *Batson*. *Batson* stands for the proposition that a defendant's *prima facia* case cannot be rebutted by an unspecified or unexamined explanation on the part of the prosecutor, simply because of judicial reluctance to call the prosecutor a liar. *Batson*, 476 U.S. at 96-97.

This is the plain implication of *Batson's* explicit statement that a simple denial of discriminatory motives is insufficient to meet the Constitution's requirements. *Id.* It is the obligation of trial courts and of appellate courts to test the prosecutor's explanation to determine if it is pretextual or genuine. Here, the court of appeals abdicated that responsibility by turning the concept of credibility on its head.

Credibility is a necessary but not sufficient condition of an explanation that can be accepted as satisfying *Batson*. The court must first satisfy itself that the explanation articulated is a sufficiently plausible reason to meet *Batson's* two-part test. Only then does the credibility of the prosecutor become relevant. In other words, *Batson*, requires a court to evaluate "both the credibility of the person offering the explanation *as well as the credibility of the asserted reasons.*" *See Florida* v. *Slappy*, 522 So. 2d at 22 (Fla.), *cert. denied*, 56 U.S.L.W. 3880 (U.S. June 28, 1988) (emphasis added).[16]

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[16] Moreover, there was no basis for the court of appeals to defer to the trial court on grounds of credibility in this instance. The court of appeals apparently proceeded on the mistaken notion that the trial court had made a credibility finding on this issue. But, as noted above, the trial court did *not* find that Mr. Green's employment as a postal worker was the reason the prosecutor decided to challenge him. J.A. 72. Thus, there was no credibility finding to which the court of appeals owed deference. Indeed, if there was a credibility inference to be drawn from the trial court's decision, it was a negative one, *i.e.*, that the trial court, after observing the prosecutor testify, did *not* give credence to her concerns about Mr. Green's occupation. The court of appeals made the only "finding" on this issue, when it "found" that the "sole reason" for this challenge was that Mr. Green was a postal worker, after rejecting the findings made by the trial court. J.A. 71-72.

Here, the court of appeals simply accepted the prosecutor's illogical explanation at face value rather than challenge her credibility. In so doing, the court abdicated its responsibility to ensure compliance with the second part of the *Batson* test. A "[court] cannot merely accept the reasons proffered at face value, but must evaluate those reasons [under the standards articulated in *Batson.*]" *Florida* v. *Slappy*, 522 So. 2d at 22. "[T]he [court] must consider whether the facially neutral explanations are contrived to avoid admitting acts of group discrimination . . . . This evaluation by the trial judge is necessary because it is possible that an attorney, although not intentionally discriminating, may try to find reasons other than race to challenge a black juror, when race may be his primary factor in deciding to strike the juror." *Branch* v. *State*, No. 6 Div. 93, slip op. at 28 (Ala. May 13, 1988).[17]

In sum, in evaluating the prosecutor's challenge of Mr. Green, the court of appeals failed to perform the exacting analysis that *Batson* requires. Rather than test the credibility of the prosecutor's explanation by objective evidence, the court accepted her concededly illogical explanation at face value. If this approach is adopted, *Batson* is undone.

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[17] The court of appeals also attempted to justify its failure to confront the irrelevance of the prosecutor's explanation on the grounds that "'[t]he challenge, after all, is still a peremptory one.'" J.A. 72. If, by this statement, it meant that an exemption from examination is necessary to preserve the very nature of peremptory challenges, the court seriously misunderstands *Batson*. *Batson* stands for the proposition that where a *prima facie* case of discrimination has been established, the prosecutor's peremptory challenges must be explained and that explanation must be evaluated under the standards established in *Batson*.

2. The court of appeals misapplied *Batson* in approving the challenge of Isabella Thomas[18]

The prosecutor explained his challenge to Ms. Thomas by testifying that he was not satisfied by her attitude toward circumstantial evidence in a case where "[circumstantial evidence] was my whole case. We had no direct evidence." *See* Batson Tr. at 106. He explained that his need to rely on the law of circumstantial evidence was due to the fact that, at the time of the challenge, he did *not* have petitioner's confession:

> Q . . . you had a confession from this defendant as to his commission of the offense in this particular case. Right?
>
> A. Right.
>
> Q. And at the time you all were conducting the voir dire the confession had been suppressed?
>
> A. That's right.
>
> Q. So, we are getting back to we did not have a confession and your case was based solely on circumstantial evidence?
>
> A. That's right.

Batson Tr. at 132.

The trial court wholly credited this explanation, noting that, although Ms. Thomas' troubles with the law of circumstantial evidence were not serious—"she . . . indicated she would follow that law if so instructed by the Court" (J.A. 48)—they became decisive in a case that was circumstantial. *Id.* The court of appeals correctly found, however, that "[c]ontrary to the . . . memory of the attorneys for the . . . parties . . . and apparently the trial

[18] The voir dire of Ms. Thomas appears at R. Vol. XI at 49-100.

judge herself . . . when the prosecuting attorney conducted his voir dire examination [of Ms. Thomas] he had appellant's written confession, which had been ruled by the trial judge to be admissible . . . . This was certainly direct evidence . . . ." J.A. 67-68.[19] As a consequence, the court of appeals found that at the time of the challenge, the prosecutor's case was not based "entirely, if at all" on circumstantial evidence. J.A. 68.

This contradiction cast such doubt on the credibility of the trial court's finding and the prosecutor's explanation that the court of appeals found the prosecutor's explanation "a little shocking and *totally not understandable.*" *Id.* (emphasis added). It concluded that "[w]ithout more, we find that we would have to hold that only an *irrational* trier of fact could have accepted this reason as a 'neutral explanation' why he used a peremptory strike on the juror." *Id.* (emphasis added).

Nonetheless, the court of appeals approved the challenge of Ms. Thomas by reasoning that, although the prosecutor had the defendant's confession at the time of the challenge, the confession "did not completely rule out an instruction . . . on the law of circumstantial evidence" (J.A. 70), and that "the prosecuting attorney exercised a peremptory on [Ms. Thomas] rather than risk a hung jury." *Id.*

a. The justification relied upon by the court of appeals was not offered by the prosecutor.

The court of appeals' explanation for the Thomas challenge was not one found by the trial court nor was it offered by the prosecutor. The prosecutor said that the

[19] The confession was subsequently suppressed on the basis of evidence that came to light after the voir dire. *See* J.A. 70.

juror's difficulty with the law of circumstantial evidence prompted the challenge because the prosecution did *not* have petitioner's confession and, as a result, circumstantial evidence "was my whole case. We had no direct evidence." The court of appeals attributed to the prosecutor an explanation that he never gave, *i.e.*, even though he had the petitioner's confession, he may have been concerned that circumstantial evidence might become relevant. In approving the Thomas challenge on the basis of an explanation of its own creation, after rejecting the explanation provided by the prosecutor as not credible, the court of appeals totally ignored the purpose of the *Batson* inquiry.

The purpose of the *Batson* inquiry is *not* to determine whether there is some explanation for the challenge that would have been adequate. The inquiry is to determine whether there has been discrimination. That requires testing the actual reason proffered by the prosecution to see whether it is genuine or pretextual. If the prosecutor's proffered reason is contradicted by the record, it cannot be accepted as genuine. *Anderson* v. *Bessemer City*, 470 U.S. 564, 575 (1985); *Roman* v. *Abrams*, 608 F. Supp. at 635; *People* v. *Hall*, 197 Cal. Rptr. at 75. The fact that there may have been other bases on which the prosecutor could have justified the challenge is irrelevant.

Once the court of appeals found that no rational fact finder "could have accepted [the] reason" proffered by the prosecutor as a "'neutral explanation'" (J.A. 72), that should have been the end of the inquiry. It is "neither the function nor the duty of the trial courts, or the appellate courts on review, to speculate as to prosecutorial motivation for . . . challenges." *People* v. *Moss*, 188 Cal. App. 3d 268, 279, 233 Cal. Rptr. 153, 159 (1986).

Indeed, the prosecutor's factually baseless explanation raises an inference of pretext. Such explanations are evidence of "selective recollection of the sort where the wish [to exclude blacks] is father to the thought." *Roman* v. *Abrams*, 608 F. Supp. 629, 635 (S.D.N.Y. 1985), *aff'd in part, rev'd in part on other grounds*, 822 F.2d 214 (2d Cir. 1987). "[A court] must . . . reject an explanation as illegitimate if it is not supported by the . . . record." *See, e.g.*, *People* v. *Hall*, 197 Cal. Rptr. at 75. After rejecting the explanation actually given, the court of appeals should have found that petitioner's *prima facie* case had not been rebutted and should have reversed his conviction.

b. The court of appeals erred in refusing to consider evidence of disparate treatment.

In sustaining the challenge of Ms. Thomas, the court of appeals also erred in refusing to consider evidence that Ms. Thomas was treated differently than similarly situated white jurors who were not challenged. Petitioner presented these comparisons in a supplemental brief submitted after the *Batson* hearing. The brief explained that nonchallenged white jurors experienced as much or more difficulty with various legal concepts, including circumstantial evidence, as did Ms. Thomas.[20]

Although the court acknowledged that such jury comparisons "cast considerable doubt upon the neutral explanations offered by counsel for the State," (J.A. 66 n.6A), it refused to consider, in reviewing the trial judge's findings, whether "unchallenged white veniremen also possessed the same purportedly undesirable characteristics [as

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[20] *See, e.g.*, voir dire of Hollingsworth (R. Vol. XIII at 1550-53); Wistert (R. Vol. VIII at 314, 318-19); Moore (R. Vol. XV at 125, 131); Deming (R. Vol. XVI at 205-07).

challenged black jurors]." *Id.* The reason given for the court's refusal to consider this evidence was that the petitioner had not made such comparisons to the trial judge at the *Batson* hearing. *Id.*

If the court of appeals had rested its decision on the trial court's findings of fact, perhaps it would have been entitled to make something of defense counsel's failure to present these comparisons to the trial court. *But see Vasquez* v. *Hillery*, 474 U.S. at 257 (holding that new analyses may be presented even to a federal habeas corpus court, when these are based on facts found in the state trial court record); *Casteneda* v. *Partida*, 430 U.S. 482, 496 & n.17 (1977) (conducting independent analyses not presented to lower courts but based on facts before those courts).

However, here the court of appeals did no such thing. It rejected the findings of the trial court and made its own *de novo* findings regarding the prosecutor's reasons for striking black jurors and the justifiability of those reasons, based on its review of the "entire jury selection process." J.A. 71. To do this, while refusing to consider evidence in the record that was inconsistent with its findings, was error. If the court of appeals was to make new findings, then it was obligated to consider evidence of record that was incompatible with those findings as well as evidence compatible with them.

The court's refusal to consider petitioner's jury comparisons is also unsupportable in light of the fact that it conducted precisely the same sort of comparison *sua sponte* in rejecting the trial court's basis for sustaining the Green challenge. *See* J.A. 72, and discussion *supra* at n.11. This underscores the lack of any legitimate procedural justification the court of appeals may have had for

refusing to consider the evidence. To disregard evidence which the court itself acknowledged "cast considerable doubt" on the prosecutor's challenges without some legitimate and evenly applied procedural justification, was impermissible under the logic of *Batson*. *Batson*, 476 U.S. at 96-98.

Comparison of the prosecutor's treatment of similarly situated jurors is highly relevant in judging the validity of the explanations offered by a prosecutor for peremptory challenges. This Court recognized in *Batson* that one basis for determining whether a prosecutor's explanation is "legitimate" is to determine whether there was "disparate treatment" between challenged black jurors and unchallenged white jurors. *Batson*, 476 U.S. at 94, n.18.[21]

If the record shows that black jurors were challenged for reasons which are equally applicable to white jurors who were not challenged, the prosecutor has engaged in "disparate treatment," and the legitimacy of his explanation is suspect. Courts have suggested that:

> *disparate treatment [of blacks and whites] is strongly suggestive of bias*, and could itself . . . warrant[] the conclusion that the prosecutor was exercising peremptory challenges for impermissible reasons.

People v. *Hall*, 672 P.2d at 859 (emphasis supplied).

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[21] "Disparate treatment" is a concept derived in part from Title VII cases. *See Batson* at 94, n.18. It has been adopted by the lower courts which conduct meaningful *Batson* review. *See People* v. *Hall*, 197 Cal. Rptr. at 76 ("Disparate treatment is strongly suggestive of bias . . . ."); *Roman* v. *Abrams*, 608 F. Supp. at 635 (disparate treatment raises an inference that the reason is "intentionally misleading."); *People* v. *Trevino*, 704 P.2d 719, 732 (Cal. 1985); *State* v. *Gilmore*, 511 A.2d at 1167.

In sustaining the Thomas challenge, while refusing to consider evidence strongly suggesting that it was based solely on race, the court of appeals committed further error.

3. The court of appeals erred in approving the challenge of Frank Samuel[22]

Although the State came closer to satisfying the requirements of *Batson* in explaining its challenge of Mr. Samuel, the court of appeals' justification for approving the challenge does not stand up to scrutiny. The court of appeals found that Samuel was struck because his "reading and writing skills were poor" and "[s]ince the case was complex and was expected to include detailed written jury instructions, the State evidently preferred to avoid literacy problems on the jury and used a peremptory strike on that person." J.A. 70. This conclusion is not supported by the record evidence.

At the *Batson* hearing the prosecutor testified that his "strong suspicion this man could not read and write" was based on the appearance of the juror information form. Batson Tr. at 135. There are two juror information forms used in Harris County: a short form that is mailed to the prospective juror and a long form which is filled out when the juror arrives for jury duty. The prosecutor testified that "in [his] opinion" someone other than Mr. Samuel had filled out the short form and that there were misspellings and incomplete or non-responsive answers on the long form.

[22] The voir dire examination of Mr. Samuel appears at R. Vol. XVI at 12-26.

During the voir dire, the prosecutor sought to confirm his suspicion that Mr. Samuel was illiterate. He asked Mr. Samuel to read the two Texas statutory sentencing questions. In response to these questions, Mr. Samuel read each of the questions without error:

> Q. Those two questions are on the board. If you will, will you read Question No. 1 for us.
>
> A. It says "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with a reasonable expectation that the death of the deceased or another would result."
>
> Q. And Question No.2?
>
> A. "Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

R. Vol. XVI at 22. These are hardly the responses of an illiterate man. Mr. Samuel's ability to read these two questions not only demonstrated an ability to read but an ability to read substantially above an elementary level.[23]

[23] The trial judge apparently viewed the prosecutor's professed concern about Samuel's literacy as symptomatic of a larger problem, *i.e.*, that it may have affected Samuel's ability to understand legal concepts. J.A. 48-49. The court of appeals did not approve this view, (compare J.A. 72, with J.A. 48-49), and it is not supported by the record. The voir dire does not reflect that Mr. Samuel had any difficulty understanding legal concepts, much less that he would have "great difficulty" understanding a capital case. J.A. 49. He was questioned on the law of causation, R. Vol. XVI at 16-20, and he indicated that he could apply it. *Id.* at 20. He was questioned on the law of parties, *id.* at 20-23, and indicated that he could apply it. *Id.* at 23. He indicated he understood that the defendant has a right not to testify. *Id.* at 23-24. He indicated that he would not require a defendant to take the stand. *Id.* at 25. And he indicated that he would not require the state to prove motive if the law did not require it. *Id.* at 26.

As discussed above, a court must reject an explanation as illegitimate if it is not supported by the record. *People* v. *Hall*, 672 P.2d at 858. Such an explanation is insufficient to rebut defendant's *prima facie* case; the court of appeals should have reversed the trial court's finding with respect to Samuel.

C. The Texas Court Of Appeals Failed To Apply The Proper Standard Of Appellate Review

The court of appeals did not apply the proper standard of review in this case. It was clearly troubled by the case. After examining the challenges at issue and concluding that each should be affirmed despite its misgivings, the court felt compelled to remind trial judges that "the truth of a racially neutral explanation should be judged in part by its plausibility" and that a trial court should "not abdicate [its] responsibility to decide whether a peremptory challenge was racially motivated . . . [or] leave such questions to appellate resolution." J.A. 72. Nonetheless the court of appeals affirmed the trial court's decision here because "we . . . find and conclude that the trial judge believed the race-neutral explanations given [by the prosecutors]" and that "[the trial judge's conclusions are] supported by sufficient evidence." *Id.* at 72-73.

It is true that trial court findings are entitled to respect, and as this Court observed in *Batson*, where those findings "turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Batson*, 476 U.S. at 98, n.21. But the doctrine of deference does not permit an appellate court to justify its acceptance of a finding which it fails to find supported by the evidence on the lone ground that the trial court believed the prosecutor.

In *Batson*, the Court cited its recent decision in *Anderson* v. *Bessemer City*, 470 U.S. 564 (1985), as an example of the standard of review to be applied. *Batson*, 476 U.S. at 98, n.21. In *Anderson*, the Court warned that a trial court may not "insulate [its] findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness." 470 U.S. at 575. The Court explained that "objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it." *Id.* In such circumstances, the appellate court may find clear error "even in a finding purportedly based on a credibility determination." *Id.*

Under the applicable clearly erroneous standard of review, appellate courts are required to reverse trial court findings if, based on the entire record, the reviewing court "is left with the definite and firm conviction that a mistake has been committed." *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1982). Where as here the factual findings of a state court control the outcome of a defendant's federal constitutional claims, this Court has insisted on examining the adequacy of State appellate review. *See Norris* v. *Alabama*, 294 U.S. 587, 590 (1935).

Adequate review of a *Batson* claim requires that a court look behind the prosecutor's explanation for the contested peremptory challenge. It must consider the prosecutor's testimony in the context of the objective facts of record to determine if the testimony provides a satisfactory explanation for excusing a minority juror although a *prima facie* case of racially discriminatory jury selection has appeared. It is the reviewing court's duty to examine the

prosecutor's reasons for the challenges in light of the totality of facts and circumstances, not to accept at face value the facial neutrality of the prosecutor's purported rationales. Ultimately, the appellate court must apply the proper legal standards to determine if the explanation was an adequate one under *Batson*.

The record in this case does not reflect the kind of careful review by the court of appeals that *Batson* demands. The court of appeals approved the Green challenge on the basis of an explanation which the court itself acknowledged was irrelevant to the case, thereby disregarding an essential element of the standards set by *Batson*. It failed to reverse the trial court's acceptance of the Thomas challenge even though the prosecutor's explanation for that challenge was rejected as "totally not understandable." And it accepted the Samuel challenge even though it, too, was unsupported by the record.

Rather than reversing the trial court's findings when it found them unsupportable, the court of appeals instead invented other bases to support the prosecutor's challenges. In the case of the Thomas challenge, the court supplied its own explanation for the challenge and approved the challenge on that basis, even though that basis had not been articulated by the prosecutor. In the case of the Green challenge, it accepted as adequate an explanation that was not advanced by the prosecutor and was not found by the trial court. And it accepted that explanation as adequate even though it conceded that it bore no logical relationship to the case. It then sought to justify its action on the ground that it was not its job to question the witness' credibility when, in fact, no credibility finding had been made. *See* the discussion associated with n.19 *supra*.

Moreover, there is no indication that the court of appeals included in its analysis a number of objective factors that strongly suggested discriminatory intent in this case. For example, the defendant here is black and his victim was white. In such cases, the incentive for discriminatory use of challenges is increased and judicial review should be more thorough. *See Commonwealth* v. *Soares*, 387 N.E.2d at 517; *People* v. *Wheeler*, 583 P.2d at 764; *People* v. *Moss*, 233 Cal. Rptr. at 158. A number of the prosecutor's explanations were inconsistent with the evidence. This pointed to an inference of pretext. *Roman* v. *Abrams*, 608 F. Supp. at 635; *People* v. *Hall*, 672 P.2d at 858. The prosecutor's explanations in other instances were implausible on their face. This also suggests pretext. *Roman* v. *Abrams*, 822 F.2d at 228; *Slappy* v. *State*, 503 So. 2d at 355. Finally, there was evidence of disparate treatment between challenged black jurors and unchallenged white jurors. Such evidence is further proof of discrimination. *Roman* v. *Abrams*, 822 F.2d at 228; *People* v. *Hall*, 672 P.2d at 858.

There is no indication that the court of appeals considered any of these factors, individually or in their totality, as independently relevant in determining the deference that should be accorded the trial court's findings. At a minimum, these factors should have caused the court to conduct a more searching review. The Texas court appears to have taken just the opposite approach.

Appellate courts have an important role to play if the protections *Batson* sought to ensure are to be a reality. They must scrupulously review the findings of trial courts, giving appropriate deference to trial court findings where such deference is warranted. But, where the findings of the trial court are unsupported or inadequate under the standards of *Batson*, appellate courts must not

be hesitant to reverse. If they are, they visibly invite and condone a regime in which *Batson* is flouted and prosecutors are given a license to violate the Constitution's guarantee of racial equality in access to the administration of justice.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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APPENDIX

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Texas Code of Criminal Procedure:

Art. 37.071. Procedure in capital case

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

Texas Penal Code:

§ 6.03. Definitions of Culpable Mental States

(a) A person acts intentionally, or with intent with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

(b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(c) A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(d) A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought

to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

§ 19.02. Murder

(a) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

(3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

(b) An offense under this section is a felony of the first degree.

§ 19.03. Capital Murder

(a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson;

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from a penal institution; or

(5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.

(b) An offense under this section is a capital felony.

(c) If the jury does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or any other lesser included offense.

§ 19.05. Involuntary Manslaughter

(a) A person commits an offense if he

(1) recklessly causes the death of an individual; or

(2) by accident or mistake when operating a motor vehicle, airplane, helicopter, or boat while intoxicated and, by reason of such intoxication, causes the death of an individual.

(b) For purposes of this section, "intoxicated" has the meaning assigned that term by Subsection(a), Article 6701-1, Revised Statutes.

(c) An offense under this section is a felony of the third degree.

§ 19.07. Criminally Negligent Homicide

(a) A person commits an offense if he causes the death of an individual by criminal negligence.

(b) An offense under this section is a Class A misdemeanor.